Supreme Court, U.S.
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No.

In the Supreme Court of the United States

NEXTEL WEST CORP.

Petitioner,

v.

P.J.'S CONCRETE PUMPING SERVICE, INC.

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an Illinois state court have the power to hear claims of other states' taxpayers seeking to recover state and local taxes erroneously collected in those other states and, in so doing, disregard the mandatory administrative tax refund procedures in those other states?

2. Does an Illinois state court's certification of a class action comprised of sixteen other states' taxpayers – whose tax laws preclude judicial remedies in favor of administrative remedies – violate the Full Faith and Credit Clause and the Due Process Clause, as described in *Phillips Petroleum Co. v. Shutts* ?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

Nextel West Corp. is a wholly owned subsidiary of Nextel Communications Inc., a publicly traded company.

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P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp., 803 N.E.2d 1020, 1030-31 (Ill. App. 2004), *appeal denied*, 209 Ill.2d 584, __ N.E.2d __ (2004) [hereinafter "*P.J.'s*"]. The orders and opinions are included in the Appendix, *infra*.

JURISDICTION

On May 15, 2002, an Illinois trial court certified a seventeen-state taxpayer class action against Nextel West Corp. ("Nextel") based on the allegation that Nextel collected telecommunication taxes imposed by municipalities from citizens who did not owe them. One Illinois citizen was the only class representative appointed. The question of class certification was certified for interlocutory review. On April 2, 2003, the Illinois Supreme Court entered a supervisory order directing the Illinois Appellate Court to hear Nextel's appeal from class certification.

On January 27, 2004, the Illinois Appellate Court rejected, *inter alia*, Nextel's argument that Illinois courts constitutionally may not adjudicate the liability of a tax collector who allegedly collected the wrong taxes from citizens of other states pursuant to those other states' tax laws. *P.J.'s*, 803 N.E.2d at 1030-31. Nextel filed a timely petition for rehearing, which was denied. Nextel then filed a timely petition for leave to appeal in the Illinois Supreme Court. On May 26, 2004, the Illinois Supreme Court denied review.

This Court has jurisdiction over the Illinois courts' class certification decision under 28 U.S.C. § 1257. The

decision below is a "final judgment" pursuant to this Court's interpretation of § 1257 in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox*, this Court recognized four categories of cases in which a state court decision constitutes a final judgment on a federal or constitutional issue, despite the fact that further state court proceedings will go forward. These categories represent types of cases in which "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice....'" *Id.* at 478 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945)).

The Illinois decision below satisfies the jurisdictional standards of 28 U.S.C. § 1257 for two reasons approved in *Cox*, either of which alone would establish an appropriate basis for immediate review.

1. The state court proceedings below cannot obviate the constitutional violation at hand: the overreaching by the Illinois courts and invasion of other states' exclusive sovereign authority over tax disputes. The class action below will bind class members from other states and either (*i*) entitle them to relief from the taxes they erroneously paid or (*ii*) hold that those citizens are *not* entitled to recover. Thus, even if Nextel wins the case on some state-law ground, it will still have been subjected to a seventeen-state class action which the Illinois courts lacked the power to entertain. Even if Nextel were to prevail, the breach of federalism and comity would have already occurred by certification of a class of other states' taxpayers.

2. Even assuming *arguendo* that subsequent state court proceedings rendered moot Nextel's constitutional claim (assuming that Nextel wins on some state-law

ground), "a refusal immediately to review the state court decision might seriously erode federal policy...." *Cox* recognized that parties should not be subjected "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.* at 484 (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555,558 (1963)). *See also Local No. 438 Const. & General Laborers Union, AFL-CIO v. Curry*, 371 U.S. 542 (1983) (Court would review state court proceeding where state court jurisdiction may be preempted by federal agency jurisdiction): *Southland v. Keating*, 465 U.S. 1 (1984) (Court would review state court's refusal to enforce arbitration provision in contract, which would undermine Federal Arbitration Act). These cases, like this one, "involve federal challenges to the jurisdiction of state courts ... The rationale for allowing interlocutory protection in these cases is that a right to be free from harassment becomes sterile when reviewed after the period of harassment has passed." Note, "The Finality Rule for Supreme Court Review of State Court Orders," 91 Harv. L. Rev. 1004, 1030 (1978).

Reversal of the decision below for the reasons contained in this Petition would terminate the litigation as it pertains to the taxpayers of sixteen states. The decision below is more pressing than an ordinary venue or subject-matter jurisdiction dispute because the exclusive sovereign power of states to administer their own tax system has been co-opted by the Illinois courts. Other states' exclusive power to decide their taxpayer claims and Nextel's right under certain state tax laws to be free from taxpayer lawsuits have both been violated. A long line of precedent from this Court, described herein, establishes the important federal policy of minimizing outside

interference with each state's administration of its tax system and handling of tax disputes. That policy would be seriously eroded should the class action below be allowed to proceed.

CONSTITUTIONAL PROVISIONS

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

Amendment XIV, United States Constitution (in pertinent part).

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment X, United States Constitution.

STATEMENT OF THE CASE

Nextel provides wireless telecommunication services in Illinois and numerous other states. *P.J.'s*, 803 N.E.2d at 1023.

Certain municipalities in the State of Illinois are permitted to impose taxes on telecommunications. The Village of Barrington ("Barrington") is one such municipality. *Id.* The Barrington municipal tax ordinances impose taxes on customers with billing

addresses in Barrington. Illinois law requires retailers such as Nextel to collect the tax from customers and to remit monies collected to Barrington. *Id.* Nextel is also obligated to charge and collect the tax obligations of its other customers in Illinois, as well as its customers in numerous other states under a variety of different state taxing regimes, which include over a thousand municipal ordinances that impose taxes on Nextel's customers pursuant to those regimes.

Respondent P.J.'s Concrete Pumping Service, Inc. ("PJCP") was a Nextel customer in Illinois. 803 N.E.2d at 1023. The address PJCP provided when it subscribed for Nextel's service stated that its address was in Barrington. Nextel included a line item on PJCP's bills for city taxes. 803 N.E.2d at 1024.

When Nextel remitted the appropriate amounts of taxes it collected to Barrington, it included amounts collected from PJCP. Nextel did not retain the taxes collected.

When PJCP noticed a "city tax" on its Nextel phone bill, PJCP realized a mistake and contacted Nextel. 803 N.E.2d at 1024. PJCP's address actually falls outside the corporate limits of Barrington in an unincorporated portion of Lake County, Illinois. 803 N.E.2d at 1023. Nextel had already collected municipal taxes from PJCP and remitted them to Barrington.

PJCP filed a complaint against Nextel in the Circuit Court for Lake County, Illinois alleging that Nextel had committed a fraud upon PJCP by collecting Barrington "city taxes", because PJCP's address was not within the corporate limits of Barrington. (*See* Complaint, ¶ 8, C2A.) The first paragraph of the class action complaint asserts:

> Plaintiff seeks declaratory relief and asserts claims against Defendant for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Illinois Consumer Fraud Act"), 815 ILCS 505/1 et seq., and the consumer fraud acts of each state in which Defendant does business and for common law fraud. Plaintiff seeks class-wide relief for Defendant's practice of assessing its customers local, municipal or gross receipts taxes where its customers do not reside in a municipality that authorizes Defendant to assess the taxes for cellular service.

See 803 N.E.2d at 1023.

Nextel moved to dismiss the Complaint on the grounds that, *inter alia*, the municipalities of the several states included within the scope of the Class were the proper defendants. (Defendant's Memorandum of Law In Support of Its Section 2-615 Motion to Dismiss at 3 *et seq.*) Nextel opposed class certification relying upon, *inter alia*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). (Defendant's Memorandum of Law In Opposition to Motion for Class Certification at 16 *et seq.*) Nextel also argued to the Circuit Court that the class action should be limited to Illinois residents only because Nextel could not implead municipalities from other states. (*Id.* at 25 *et seq.*)

The Circuit Court for Lake County, Illinois denied Nextel's motion to dismiss and certified the following class (the "Class") with PJCP as the sole class representative:

> All persons in Illinois, Arizona, Colorado, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin who, on or after August 30, 1996, paid Defendant local, municipal, or substantially-similar taxes at a time when their billing address was not within a municipality that authorized or directed Defendant to collect the tax.

Class Certification Order; *see also* 803 N.E.2d at 1024.

The class action complaint makes clear that the damages sought are the amount of taxes paid by Class members to Nextel (which Nextel distributed to municipalities in seventeen states). (Compl. ¶¶ 32, 39.) PJCP further seeks punitive damages payable to the Class. (Compl. Page 6 ¶ c; Page 8 ¶ c.) PJCP also seeks a declaration that "Plaintiff and all members of the Class are entitled to a refund of all local, municipal, gross receipts or substantially similar taxes Defendant collected." (Compl. Page 9 ¶ c.)

In addition to the Illinois-specific issues raised on appeal, Nextel asserted that Illinois courts lacked the power under the United States Constitution to hear the claims of other states' taxpayers who were included in the Class. (Brief of Appellant Nextel West Corp. at 30 *et seq.*; Reply Brief of Appellant at 18 *et seq.*) The Illinois Appellate Court rejected those arguments and affirmed jurisdiction over taxpayers and taxing regimes of sixteen other states. (Appendix B at 19.) Nextel raised its constitutional arguments in its Petition for Leave to Appeal ("PLA") to the Illinois Supreme Court. (PLA at

18 *et seq.*) The Illinois Supreme Court denied review. (Appendix A.)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS PART OF A RECENT BODY OF STATE COURT DECISIONS WHICH ARE DEVELOPING IN CONFLICT WITH THE CASE LAW OF THIS COURT AND OTHER STATE COURTS REGARDING EACH STATE'S EXCLUSIVE SOVEREIGN AUTHORITY OVER ITS CITIZENS' TAX DISPUTES.

The Illinois decision below deprives home states of authority to decide (*i*) whether their citizens are entitled to tax refunds and, if so, (*ii*) whether private tax collectors like Nextel are liable for erroneously collecting a tax. Just as citizens of one state may not simply walk into federal court with their state-law tax disputes, under the guise of a class action they should not be able to walk across the border into a sister state's courts either and have their home state tax issues litigated.

This Petition should be granted because the decision below diverges from the decisions of this Court and other state courts regarding the vital issue of each state's exclusive sovereign power over its revenue and the laws governing the collection and retention of that revenue.

A. The Decision Below Conflicts With This Court's Decisions Recognizing Each State's Exclusive Authority To Hear Its Citizens' Tax Disputes.

This Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995). The rationale for noninterference by other sovereigns is a pragmatic one:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

Dows v. Chicago, 11 Wall. 108, 110, 20 L.Ed. 65 (U.S. 1871). Bedrock principles such as comity and federalism take on added significance where state taxation is concerned because taxes are "the life-blood of government." *Bull v. United States*, 295 U.S. 247, 259 (1935).

This Court has protected the right of each state to determine for itself what remedies shall be available to its citizens in the tax context (subject only to the minimum requirements of constitutional due process). *See National Private Truck,* 515 U.S. at 582 (discussing *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)).

As a result, this Court long ago refused to allow state taxpayers to bring tax-related claims in federal court where an adequate remedy exists in the respective states themselves. *See First Nat'l Bank of Greeley v. Bd. of County Comm'rs of Weld County*, 264 U.S. 450, 453 (1924) (refusing to hear claim regarding state tax dispute where plaintiff had not first exhausted the administrative procedures afforded under state law).

In *Fair Assessment In Real Estate Ass, Inc. v. McNary*, 454 U.S. 100 (1981), this Court concluded that state "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Id.* at 116. Comity requires respect for the sovereign authority of states over the enforcement of their own tax laws. *Id.* at 112, n.6 (defining "comity" as "a proper respect for State functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.")

This Court has since confirmed that interference by *state courts* can be just as disruptive as federal court interference. Thus, the principles girding *McNary* also preclude § 1983 claims and declaratory judgment actions arising out of state tax disputes – even when the cases are brought in a *state* court. *National Private Truck*, 515 U.S. at 591.

Granting this Petition enables the Court to announce explicitly a crucial rule of law that logically follows from the comity principle running through cases from *Weld County* to *National Private Truck*: Citizens of one state may not use the courts of a different sovereign to

avoid bringing their tax disputes within the remedial framework provided in their home states. Put another way, one state may not allow its courts to become a haven for undermining the exclusive authority of sister states to hear and to remedy their taxpayers' disputes. The decision below is antithetical to this Court's decisions regarding sovereignty, comity and federalism; therefore, immediate review is warranted.

B. State Courts Have Customarily And Appropriately Refused To Hear Tax Disputes From Other States.

Principles of sovereignty and comity have led state courts to refuse to hear tax disputes from other states. The Court of Appeals of New York has held that "for our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State." *City of Phila. v. Cohen*, 184 N.E.2d 167, 169 (N.Y. 1962). *See also Ferguson v. Kroger Co.*, 37 S.W.3d 590, 592 (Ark. 2001); *State of Minnesota v. Karp*, 84 N.E.2d 76, 79 (Ohio App. 1948).

The Arkansas courts in *Ferguson* denied class certification of a proposed multi-state class of customers who challenged a grocery store's collection of sales taxes. While the Arkansas Supreme Court held that the plaintiffs had failed to satisfy the requisites for the Arkansas class action statute, it is noteworthy that the Arkansas trial court found "that it was without jurisdiction to order the treasuries of other states to refund tax revenues." 37 S.W.3d at 592, 595 (discussing lower court's decision).

The Ohio courts in *Karp* concluded that it would be unconstitutional for one state to use the courts of another state to enforce the former's tax laws:

> That, it seems to us, was an attempt by Minnesota to extend its sovereignty beyond its boundaries and control and bind the defendant. No such power resides in any state and an attempt to so extend its power is void and violates the XIVth Amendment to the Constitution of the United States. To give effect to such an attempt would deprive the defendant of property without due process of law.

84 N.E.2d at 81.

The law has developed in accordance with Judge Learned Hand's admonition that each state's tax disputes must be decided by its own state courts:

> To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted [*sic*] to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring), *aff'd on other grounds*, 281 U.S. 18 (1930)

(holding that a tax collector of one state has no standing to sue in courts of another sovereign). *See also* American Jurisprudence, 2d ed., State and Local Taxation § 778 ("Even if a tax upon a nonresident is a personal liability, the nonresident cannot be sued upon it except in the courts of the state in which it was assessed.").

In effect, each state defers to the courts of a sister state, rather than injecting itself into a sister state's tax controversy. Such deference is a building block of federalism and a fundamental tenet of comity. And, of equal significance, such interstate deference represents a practical and appropriate division of responsibilities because not all states treat taxpayer disputes the same way. Indeed, many states have adopted an administrative scheme to resolve such disputes.

C. A Number Of States Encompassed By The Class Require Citizens To Comply With Administrative Refund Procedures If They Believe They Have Paid An Erroneous Telecommunication Tax. These Laws Are Being Circumvented.

The Class includes citizens who would have absolutely no right to file a lawsuit in the courts of their own states based on the facts asserted in the Complaint in this case, yet they have been permitted to litigate in Illinois. The Illinois courts have disregarded an array of carefully drawn schemes designed to rectify mistakes made by entities required to collect taxes on behalf of state and local governments *without subjecting the tax collectors to lawsuits*.

These administrative remedial schemes evince a public policy decision by the respective states. These

states protect entities like Nextel, the proverbial middle man functioning as a tax collector, from the burden and expense of litigation over mistakes that could otherwise be easily rectified with a refund.

For example, if a customer in Arizona is charged a mobile telecommunication service tax yet "believes that the charge is incorrect, the customer shall notify the [ ] service provider in writing of the contested charge." Ariz. Rev. Stat. § 42.5034.01(B). A service provider like Nextel thereafter has an opportunity to correct any error and/or refund any improperly collected amount. Ariz. Rev. Stat. § 42.5034.01(C). Most significantly, Arizona law provides:

> The procedures in this section are the first course of remedy available to any consumer seeking correction of assignment of place of primary use or taxing jurisdiction or a refund of other compensation for taxes assessed or other charges erroneously collected by the [ ] service provider under this section. No cause of action based on a dispute arising from the collection of taxes by the [ ] service provider under this section shall accrue until that customer has reasonably exercised the rights and procedures prescribed in this section.

Ariz. Rev. Stat. §§ 42.5034.01(D), 42-6007.

Colorado's approach is similar, as is that of Kentucky, Missouri and Utah. "If a customer believes that a tax, charge, or fee assessed ... in the customer's bill for mobile telecommunication service is erroneous ... the customer shall notify the [ ] service provider in writing

within two years after the date the bill was issued." Colo. Rev. Stat. § 39-26-104(1)(c)(II)(A). "Any customer ... may file a claim in the appropriate district court only after complying with the provisions of this subparagraph (II)." Colo. Rev. Stat. § 39-26-104(1)(c)(II)(C). "A customer shall not have a cause of action against a home service provider for any erroneously collected taxes, charges, or fees until the customer has exhausted the procedure set forth in subsection (2) of this section." Ky. Rev. Stat. § 139.775. "A customer may not bring a cause of action against a telecommunications provider on the basis that the telecommunications provider erroneously recovered from the customer municipal telecommunications license taxes authorized by this part unless the customer meets the same requirements that a purchaser is required to meet to bring a cause of action against a seller for a refund or credit as provided in Subsection 59-12-110.1(3)." Utah Stat. § 10-1-408 (as amended by House Bill 273 on March 22, 2004). *See also* Missouri Stat. § 144.190(5) (establishing procedure for requesting refund of telecommunication taxes).

In New Mexico, service providers like Nextel are responsible for assessing and collecting surcharges and remitting them to the state department of revenue. N.M. Stat. § 63-9F-11(B-C). These surcharges are governed by New Mexico's Tax Administration Act, N.M. Stat. § 7-1-2(A)(21). The Tax Administration Act requires taxpayers who dispute the assessment of any tax to file a written protest with the state secretary of taxation and revenue. N.M. Stat. § 7-1-24. Trial courts in New Mexico may not "entertain any proceeding by a taxpayer in which the taxpayer calls into question the taxpayer's liability for any tax or the application to the taxpayer of any provision of the Tax Administration Act". N.M. Stat. § 7-1-22.

Instead, the only judicial remedy available for taxpayer disputes in New Mexico is the right to appeal from decisions of the secretary of taxation and revenue directly to the state court of appeals. *Id.*

North Dakota keeps all tax disputes within the confines of an administrative process, and apparently rejects any judicial cause of action for such disputes. If a North Dakota customer disputes a tax imposed by a mobile telecommunication service provider such as Nextel, the customer must first file a written notice with the provider, as prescribed by statute. N.D. Century Code § 57-34.1-05(1). "If the customer is dissatisfied with the response of the home service provider under this section, the customer may seek correction or refund from the taxing jurisdiction affected." N.D. Century Code § 57-34.1-05(2). "The procedure in this section is the sole and exclusive remedy available to customers seeking correction of assignment of place of primary use, taxing jurisdiction, a refund, or other compensation for taxes or fees erroneously collected by the home service provider." N.D. Century Code § 57-34.1-05(3).

Minnesota requires that tax claims against vendors be brought either in the customer's county or the county of the vendor's principal place of business. Minn. Stat. § 289A.50(7)(f).

There is no cause of action for a sales tax dispute in Kansas unless the taxpayer has first given a company the opportunity to review and refund amounts erroneously collected. "A cause of action against the seller for the over-collected sales or use taxes does not accrue until a purchaser has provided written notice to a seller and the seller has had 60 days to respond." Kansas Stat. § 79-3650.

As is evident from the administrative remedial schemes above, many states have made a conscious public policy decision to protect private entities like Nextel from lawsuits arising from Nextel's mandatory role as tax collector.[1] Likewise, these states have decided that taxpayers do not have any causes of action in the absence of compliance with the home state's administrative process. This Petition is important because these tax laws were ignored by the Illinois courts' decision below.

D. Recent State Court Decisions Have Broken With The Longstanding Refusal Of State Courts To Serve As The Forum For Tax Disputes Involving The Citizens And Tax Laws Of Sister States.

Unfortunately, the path charted by the decision below is laden with undesirable incentives. Without intervention by this Court, the *P.J.'s* decision will encourage litigants in various states to take individual tax disputes in their home states and recast them as multi-state class actions. The resulting nationwide scramble for state taxpayer claims would be an unhealthy condition in our Republic of sister sovereigns.

Beginning with a similar case brought to this Court's attention earlier this year, that scramble has already begun. *See AT&T Corp. v. Allen*, No. 03-1046, *cert. denied*, 124 S. Ct. 2066 (April 26, 2004). *Allen* involved a nearly identical claim raised in an Oklahoma state court against AT&T, another mobile

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[1] In addition to the states described above, each of the states included in the Class has its own array of laws and administrative regulations governing tax disputes and refunds.

telecommunication service provider. As in the case below, *Allen* also involved a multi-state taxpayer case.[2]

This body of law is developing in a way divergent from the longstanding reluctance of state courts to police tax disputes from other states. Not only does the Illinois and Oklahoma courts' approach diverge from sister state court decisions (see Part B *supra*) and ignore sister states' administrative procedures (see Part C *supra*), the decision below also conflicts with a line of authority from this Court preserving each state's exclusive authority over its citizens' tax disputes (see Part A *supra*).

This Court has specifically recoiled from the prospect of having one state's tax collection agents summoned into another sovereign's courts to defend their assessments and face prayers for damages. *McNary*, 454 U.S. at 114. Such a result would have "an undeniable chilling effect" on tax collection because tax collectors might well cease the conduct for which they were being held liable, regardless of whether their assessments and collection efforts had been performed in good faith on behalf of government taxing bodies. *Id.* at 115. This chilling effect on private tax collectors in other states is another example of the interference with other states' tax systems resulting from class certification.

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[2] The class in Allen was defined as:
"All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location where they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:
Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia; Wyoming."

For better or worse, multi-state class action practice brings with it powerful forum-shopping incentives and intense pressure on defendants with nationwide exposure to settle, leading to dislocations in the law. Competing multi-state class actions in different jurisdictions often preclude coordination, as exemplified by asbestos and tobacco litigation. This Court should not allow state and municipal taxation to suffer a similar fate. Comity commands that the public fisc of each separate and co-equal sovereign should not be subject to external interference by courts in sister states.

II. THE DECISION BELOW VIOLATES THE FULL FAITH AND CREDIT CLAUSE AS WELL AS THE DUE PROCESS CLAUSE, AS CONSTRUED IN *PHILLIPS PETROLEUM CO. v. SHUTTS.*

The decision below is in conflict with the Court's bedrock decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Illinois courts, like their Oklahoma counterparts in *Allen*, have refused to faithfully apply the tax laws of other states, which would preclude the citizens of those states from suing a private tax collector rather than engaging in an administrative refund procedure or otherwise being compliant with tax laws of their home states. Thus, by including the citizens from such states within the Class, Illinois has already violated the Full Faith and Credit Clause, as interpreted in *Shutts*.

Shutts held that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." (citing *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)). *Shutts*

involved a multi-state plaintiff class action against one defendant. The Kansas courts applied Kansas law to each claim, despite the fact that over 97% of the plaintiffs had no connection with Kansas other than being plaintiffs in the lawsuit. *Id.* at 814-15.

On appeal, this Court found that the Due Process rights of a defendant, as well as a state's obligations to sister states under the Full Faith and Credit Clause, together prohibited Kansas from applying its own law to claims and plaintiffs with whom Kansas had little or no contacts. *Shutts*, 472 U.S. at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

Though Kansas had an interest in protecting its own citizens and regulating Phillips Petroleum's conduct in Kansas, this Court held that "given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with [other] jurisdictions . . ., we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822.

Here, the taxpayers from states such those described in Part I-C *supra* are prohibited by their own state laws from suing Nextel, rather than engaging in the administrative tax refund processes those states have prescribed. By including those taxpayers in the certified Class, the Illinois courts have *ipso facto* refused to apply the law of such other states. This is a violation of the Full Faith and Credit Clause and of this Court's holding in *Shutts* – a violation that both Illinois and Oklahoma have now countenanced.

The decision below also violates Nextel's due process rights under *Shutts* by depriving it of the

protections afforded under those other state laws. There is no certainty that Nextel will be allowed to seek a refund from other states and municipalities for taxes already remitted should a judgment enter against Nextel in the Illinois case below. For states that require tax refunds to originate in the form of administrative claims, a judgment entered in Illinois is not sufficient to entitle Nextel to seek a refund of taxes collected and remitted because the administrative process in those states was never begun. Moreover, it is unlikely Nextel would be the proper party to seek a refund in those states where the taxpayer (not the collector) must initiate the refund process. In light of these problems, the rules and protections governing tax refunds in other states will be evaded, leaving Nextel to pay damages despite not being able to qualify for refunds.

One court pointed to similar concerns in refusing to allow taxpayers to bring common law lawsuits in lieu of administrative tax refund proceedings: "it would throw a monkey wrench into machinery designed to confine suits in the federal courts against the government *in order to protect its private as well as public agents from being whipsawed.*" *Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 353 (7th Cir. 1997) (emphasis added).

Compounding the breach of *Shutts* is the fact that the state laws which Illinois has ignored are laws touching on the core of sister states' sovereignty. This Court recently reiterated that the power to enforce a state's tax laws is an essential attribute of its sovereignty, as is the ability to create administrative remedies for taxpayer claims. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 498 (2003). In fact, this Court has affirmatively counseled states that they may rely on internal procedural safeguards and limited remedies in order to counterbalance the

possibility of unexpected lawsuits that would jeopardize the state treasury.

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint ... The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

McKesson, 496 U.S. at 45; *see also id.* at 50.

As such, there are "obvious" special reasons justifying noninterference by other sovereigns with the procedures created by the states to deal with tax disputes:

> The procedures for mass assessment and collection of State taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the State procedures. If federal declaratory relief were available to test State tax assessments, State tax administration might be thrown into

> disarray, and *taxpayers might escape the ordinary procedural requirements imposed by State law.*

McNary, 454 at 180, n.6 (1981) (emphasis added) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128, n.17 (1971) (Brennan, J., concurring in part and dissenting in part)).

As four Justices of this Court once acknowledged, taxpayers "should not be able to circumvent the exhaustion requirement by designedly not bringing suit against the single potential defendant to have actually benefited from the collection of the allegedly unlawful tax." *McNary*, 454 U.S. at 135, n.24 (Brennan, J., concurring).

The decision below, like the comparable decision in *Allen*, will allow citizens to escape procedural requirements in their respective home states by electing instead to allow their claims to be decided in out-of-state class actions. The certification of a multi-state taxpayer class below is itself a violation of *Shutts*. Illinois has not applied the tax laws of other states because Illinois courts have included the citizens of those other states in the Class even though their home states prohibit them from raising their claims outside the administrative process. The decision below violates the Full Faith and Credit Clause. And depriving Nextel of the administrative processes in those other states violates the Due Process Clause. Only this Court is in a position to foreclose the attempt by Illinois courts to ignore other states' exclusive prerogative to decide if and how to police their tax laws.

This case presents the Court with the opportunity to craft an appropriate rule that principles of comity and

federalism ordinarily preclude state courts from harboring other states' tax disputes. The Court should preserve for each state an exclusive authority to handle its internal tax disputes. If nothing else, however, this Court should review the judgment below to determine whether *Shutts* prohibits Illinois from applying its own laws to tax disputes with no connection to Illinois by ignoring other states' tax refund administrative procedures.

CONCLUSION

For all of these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted.

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APPENDIX A

Supreme Court of Illinois.

P.J.'S CONCRETE PUMPING SERVICE, INC., etc.,
respondent,
v.
NEXTEL WEST CORP., petitioner.

No. 98166.

May 26, 2004.

Petition for leave to appeal denied.

209 Ill.2d 584, __ N.E.2d __.

APPENDIX B

Appellate Court of Illinois,
Second District.

P.J.'S CONCRETE PUMPING SERVICE, INC.,

Indiv. and on Behalf of All
Others Similarly Situated, Plaintiff-Appellee,

v.

NEXTEL WEST CORPORATION,

Defendant-Appellant.

No. 2-02-1219.

Jan. 27, 2004.
Rehearing Denied Feb. 26, 2004

Justice CALLUM delivered the opinion of the court:

I. INTRODUCTION

Plaintiff, P.J.'s Concrete Pumping Service, Inc., filed a class action alleging that, by collecting, on behalf of municipalities, taxes from customers located in unincorporated areas, defendant, Nextel West Corporation, violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 et seq. (West 2000)) and was guilty of common-law fraud. The trial court certified a class of defendant's customers residing in Illinois and 16 other states. The trial court denied defendant's motion for reconsideration but certified the following question for review pursuant to Supreme Court Rule 308(a) (155 Ill.2d R. 308(a)): "Did the Illinois Supreme Court decision in *Oliveira v. Amoco*

Oil Co., [201 Ill.2d 134, 267 Ill.Dec. 14, 776 N.E.2d 151 (2002)], change the pleading requirements for misrepresentation claims in a class action suit under the Illinois Consumer Fraud Act to require an allegation of actual deception by each individual class member?" We affirm the order certifying the class, answer the certified question in the negative, and remand the cause.

II. BACKGROUND

Plaintiff's complaint alleges the following relevant facts. Defendant provides cellular telephone service, and plaintiff was defendant's customer. Plaintiff's place of business was located in unincorporated Lake County, just outside the Barrington village limits. Defendant was authorized to collect taxes on behalf of the municipalities that imposed them. The taxes were based on the revenues defendant generated from the cellular service it provided to customers residing within the municipalities that imposed them. If the zip code the customer provided when signing up for service with defendant placed the customer within a zip code area including a municipality authorizing taxes, then defendant would assess such taxes against the customer. Plaintiff's monthly bills included assessments for "City-Utility Tax" and "City-Gross Receipts Tax."

Plaintiff's complaint defined the class as "[a]ll persons who paid Defendant local, municipal, gross receipts or substantially similar taxes and do not live or have a place of business within a municipality that authorizes defendant to assess the taxes." Plaintiff alleged that defendant engaged in deceptive acts and practices by collecting these taxes even though it knew at the time that the customers may not live in municipalities that authorized defendant to assess the taxes. Defendant even continued to collect the taxes from those customers who informed defendant that they lived in unincorporated areas or in municipalities that did not authorize

such taxes. Defendant intended that plaintiff and the other class members rely on its representations that the taxes were owed and that defendant was authorized to collect them. Defendant's representations and omissions injured plaintiff and the other class members by causing them to pay defendant money they otherwise would not have paid.

The complaint alleged that defendant violated the Consumer Fraud Act and similar acts of the other states in which defendant did business. Also, the complaint sought recovery for common-law fraud and a declaration that defendant cannot assess local taxes against its customers who do not live in municipalities that authorize defendant to collect the taxes.

Defendant moved to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2000)). Defendant argued that the Village of Barrington was the proper defendant and that the voluntary payment doctrine barred plaintiff's claims. The trial court denied the motion. Defendant raised four affirmative defenses: (1) the voluntary payment doctrine barred plaintiff's claims; (2) it was not the proper defendant; (3) it could not be liable because it merely relied on the Barrington address plaintiff provided; and (4) plaintiff failed to comply with the subscriber agreement, which provided that, if a customer disputed a charge, the customer must provide a written explanation within 45 days of the disputed invoice.

Discovery revealed that plaintiff became defendant's customer in February 1997. In 1999, plaintiff moved to the location that is the subject of this suit. Plaintiff knew that its property did not lie within any municipality. The address plaintiff provided to defendant stated that the property was in Barrington. Shortly after plaintiff purchased the property, it sent a letter to the Village of Lake Barrington asking that municipality to annex plaintiff's property. The Village of Lake

Barrington replied that it was not interested in annexing the property.

In January 2000, defendant began collecting Barrington taxes from plaintiff. Plaintiff paid its monthly bills, including the tax assessments, without protest. Around January 2001, Mary Lareau, one of plaintiff's employees and the wife of plaintiff's president, first noticed the municipal tax assessments and believed that defendant had made a mistake. Ms. Lareau called defendant, and a customer service representative informed her that defendant collected municipal taxes based on zip codes and that plaintiff had to pay the tax. After speaking to the customer service representative, Ms. Lareau believed that the assessments were proper.

Arguing against class certification, defendant raised several contentions. According to defendant, several individual factual issues predominated over the common issues. The issues that would have to be addressed for each class member were reliance and proximate cause, the voluntary payment doctrine, and where each customer received its bills in relation to a municipal boundary. Also, defendant argued that, because the class action implicated the tax ordinances of over 1,000 local governments and the laws of 17 states, the individual legal issues predominated. Moreover, according to defendant, plaintiff was an inadequate class representative because it was subject to unique defenses about whether its own misstatements induced defendant to include line items for Barrington taxes on plaintiff's bills. Finally, defendant asserted that class certification was inappropriate because it would preclude defendant from filing third-party claims against the out-of-state municipalities that ultimately received the taxes defendant collected from customers.

On May 18, 2002, the trial court certified the class as defined in the complaint. On September 21, 2002, defendant asked the court to reconsider the certification order or

alternatively to certify questions for an interlocutory appeal pursuant to Rule 308(a). Defendant argued that Oliveira, decided on June 20, 2002, impliedly overruled several of the cases upon which plaintiff, and presumably the trial court, relied to certify the class. Oliveira held that a plaintiff alleging a violation of the Consumer Fraud Act must prove that he or she was actually deceived by the defendant's conduct. *Oliveira*, 201 Ill.2d at 155, 267 Ill.Dec. 14, 776 N.E.2d 151. Defendant argued that, because plaintiff was sophisticated enough to discover that the tax assessments were incorrect but not zealous enough to refuse to pay them, it could not prove that defendant's conduct deceived it. Defendant asserted further that the class members likely had different levels of knowledge about the correctness of the assessments and therefore that class certification was inappropriate.

Defendant asked the trial court to certify the following questions in the event the court denied the motion to reconsider:

"(a) Whether *Oliveira* allows a [C]onsumer [F]raud [A]ct class action to proceed here, given the fact that the named plaintiff's testimony clearly demonstrates that the question of 'actual deception' will require a different analysis for each class member; and

(b) Whether a nation-wide class action (as opposed to an action limited to Illinois customers) is proper given the standards articulated in *Oliveira*."

The trial court found that there was substantial ground for difference of opinion about (1) "whether the Class should be certified, in light of *Oliveira* and its actual deception standard for proximate causation"; (2) "how *Oliveira* affects class certification generally and pleading requirements specifically"; and (3) "whether a nationwide consumer fraud class action may proceed here given *Oliveira*." Accordingly, the court certified the following question: "Did [*Oliveira*] change the pleading

requirements for misrepresentation claims in a class action suit under the Illinois Consumer Fraud Act to require an allegation of actual deception by each individual class member?"

This court denied defendant's application for leave to appeal. Defendant petitioned for leave to appeal to the supreme court. The supreme court entered a supervisory order vacating this court's denial of leave to appeal and directing us to consider the certified question. Pursuant to the supervisory order, this court recalled its mandate and reinstated defendant's appeal.

III. DISCUSSION

Initially, we note that plaintiff complains that defendant's brief is deficient in several respects. After reviewing defendant's brief, we conclude that only two issues warrant comment. First, defendant's statement of facts does contain some statements bordering on legal argument. See Official Reports Advance Sheet No. 21 (October 17, 2001), R. 341(e)(6), eff. October 1, 2001 (the appellant's brief shall contain a statement of "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment"). For example, on page nine of its brief, defendant states that "[t]he invoice did not deceive [plaintiff] into believing that it was liable for a city tax." We have reviewed the record and will disregard any parts of defendant's statement of facts that are unsupported by the record. Second, we agree with plaintiff that defendant improperly relies on *Abad v. The Reader's Digest Ass'n, Inc.*, No. 1-01-2010 (2003) (unpublished order under Supreme Court Rule 23), filed on May 9, 2003. Although a motion to publish in *Abad* was pending when defendant filed its brief, the court has since denied that motion. We note that, in September 2003, the *Abad* court withdrew the Rule 23 order and filed a modified Rule 23 order. Therefore, the decision in *Abad* remains unpublished and has no precedential value. 166 Ill.2d R. 23(e). Accordingly, we will not consider it.

A. Scope of Rule 308 Interlocutory Appeal

On appeal, defendant asks that we answer the certified question in the affirmative and decertify the class. We note that our supreme court recently amended Supreme Court Rule 306(a) to provide for permissive interlocutory appeals from orders granting or denying certification of a class action. Official Reports Advance Sheet No. 5 (March 5, 2003), R. 306(a)(8), eff. January 1, 2003. The amendment did not become effective, however, until after the proceedings giving rise to this appeal.

This appeal is from a question certified pursuant to Rule 308(a). When a trial court enters an interlocutory order not otherwise appealable and finds that the order involves a question of law about which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the termination of the litigation, then the court shall so state in writing and identify the question of law involved. 155 Ill.2d R. 308(a). The parties dispute the scope of this appeal. Defendant asserts that, to answer the certified question, we must address the propriety of the order certifying the class. Plaintiff argues that we may answer only the question the trial court certified.

Generally, the scope of review in an interlocutory appeal brought under Rule 308 is strictly limited to the certified question. *Reich v. Gendreau*, 308 Ill.App.3d 825, 828, 242 Ill.Dec. 355, 721 N.E.2d 634 (1999). Thus, our task is to answer the certified question rather than to rule on the propriety of any underlying order. *Danner v. Norfolk & Western Ry. Co.*, 271 Ill.App.3d 598, 601, 207 Ill.Dec. 903, 648 N.E.2d 603 (1995). In the interests of judicial economy and reaching an equitable result, however, a reviewing court may go beyond the certified question and consider the appropriateness of the order giving rise to the appeal. *Bright v. Dicke*, 166 Ill.2d 204, 208, 209 Ill.Dec. 735, 652 N.E.2d 275 (1995); *City of Waukegan v.*

Environmental Protection Agency, 339 Ill.App.3d 963, 972, 274 Ill.Dec. 543, 791 N.E.2d 635 (2003).

It is not uncommon for a reviewing court in class action to go beyond the certified question and address the propriety of the decision to certify a class action. *Arriola v. Time Insurance Co.*, 323 Ill.App.3d 138, 143, 256 Ill.Dec. 168, 751 N.E.2d 221 (2001); *Gordon v. Boden*, 224 Ill.App.3d 195, 199, 166 Ill.Dec. 503, 586 N.E.2d 461 (1991). In *Arriola* and *Gordon*, the reviewing courts addressed the propriety of the trial courts' class certification orders in addition to the certified questions because the reviewing courts concluded that they could not " 'neatly compartmentalize and independently resolve one issue and not the other.' " *Arriola*, 323 Ill.App.3d at 143, 256 Ill.Dec. 168, 751 N.E.2d 221, quoting *Gordon*, 224 Ill.App.3d at 199, 166 Ill.Dec. 503, 586 N.E.2d 461.

Similarly, the propriety of the class certification here is intertwined with the certified question. As the trial court found when it certified the question, there is substantial ground for difference of opinion about whether a multi-state class action may proceed here in light of the "actual deception" requirement stated in *Oliveira*. Also, multi-state class actions place a tremendous burden on the state's court system and taxpayers and have significant consequences for absent class members who would be bound by an Illinois judgment. *Arriola*, 323 Ill.App.3d at 143, 256 Ill.Dec. 168, 751 N.E.2d 221. Thus, our supreme court recognized long ago that Rule 308 is a means of reviewing an order granting class certification at an early stage of the litigation. *Frank v. Teachers Insurance & Annuity Ass'n of America*, 71 Ill.2d 583, 590-91, 17 Ill.Dec. 796, 376 N.E.2d 1377 (1978); *see also Gordon*, 224 Ill.App.3d at 198, 166 Ill.Dec. 503, 586 N.E.2d 461.

For these reasons, in addition to answering the certified question, we will address whether the trial court properly certified the class action. We note that, although the certified

question refers to pleading requirements, we do not believe that it is appropriate to review the trial court's order denying the motion to dismiss the complaint. It was the order certifying the class action, not the denial of the motion to dismiss, that gave rise to this interlocutory appeal. Therefore, we express no opinion here about the substantive issues raised in the motion to dismiss or the affirmative defenses.

B. Certified Question--Consumer Fraud Act

The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 416-17, 266 Ill.Dec. 879, 775 N.E.2d 951 (2002). The Consumer Fraud Act describes unfair or deceptive practices as:

"including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act' [(815 ILCS 510/2 (West 2002))] * * * in the conduct of any trade or commerce." 815 ILCS 505/2 (West 2002).

Any person who suffers actual damage as a result of another person's violation of the Consumer Fraud Act may bring an action against the other person. 815 ILCS 505/10a(a) (West 2002). The elements of a claim under the Consumer Fraud Act are (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the occurrence of the deception in a course of conduct involving trade or commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception. *Zekman v.*

Direct American Marketers, Inc., 182 Ill.2d 359, 373, 231 Ill.Dec. 80, 695 N.E.2d 853 (1998).

In *Oliveira*, the plaintiff filed a class action alleging that the defendant violated the Consumer Fraud Act by falsely representing in a series of advertisements that the use of its premium gasolines would improve engine performance and benefit the environment. The plaintiff alleged that he purchased the defendant's premium gasoline and suffered actual damage as a result of the allegedly deceptive advertisements. The plaintiff did not allege, however, that he saw, heard, or read any of the advertisements or that the advertisements deceived him or induced him to buy the gasoline. Instead, the plaintiff advanced a "market theory" of causation and alleged that the advertisements created an artificially inflated demand and price for the gasoline. The trial court found that the "market theory" was not sufficient to allege causation under the Consumer Fraud Act and accordingly dismissed the complaint.

The supreme court in *Oliveira* concluded that *Zekman* controlled. In *Zekman*, the plaintiff received from a direct mail marketer a series of allegedly deceptive mailings stating that the plaintiff had won a prize. The mailings listed as prizes large cash awards as well as discount coupons for various products or services. The mailings stated that the recipient could respond by mail or by calling a "900" number and listed the odds of winning the prizes. They urged recipients to call the "900" number in order to claim their prizes immediately. By calling, the recipients incurred telephone charges between $8 and $10. The plaintiff called the "900" number several times and each time won only discount coupons. During his deposition, the plaintiff acknowledged that he understood that he could respond by mail and that he would incur charges by calling the "900" number.

The *Zekman* court held that a summary judgment for the defendants was proper because the plaintiff understood the

requirements and costs of the direct marketer's program. *Zekman*, 182 Ill.2d at 375, 231 Ill.Dec. 80, 695 N.E.2d 853. According to the court, "we do not believe that there remains a genuine issue of material fact whether the alleged violations of the [Consumer Fraud] Act by [the defendants] proximately caused [the plaintiff's] damage, for plaintiff's testimony demonstrates that he was not deceived by [the defendants'] actions." *Zekman*, 182 Ill.2d at 376, 231 Ill.Dec. 80, 695 N.E.2d 853.

The *Oliveira* court stated that "*Zekman* makes clear that, to properly plead the element of proximate causation in a private cause of action for deceptive advertising brought under the [Consumer Fraud] Act, a plaintiff must allege that he was, in some manner, deceived." *Oliveira*, 201 Ill.2d at 155, 267 Ill.Dec. 14, 776 N.E.2d 151. The court concluded that the complaint before it was deficient in the same manner as the complaint in *Zekman*. *Oliveira*, 201 Ill.2d at 154, 267 Ill.Dec. 14, 776 N.E.2d 151. Because the plaintiff did not allege that he saw, heard, or read any of the defendant's advertisements, he could not allege that he believed that he was buying gasoline that benefitted the environment or improved engine performance. *Oliveira*, 201 Ill.2d at 155, 267 Ill.Dec. 14, 776 N.E.2d 151.

The court observed that, under the plaintiff's "market theory" of causation, purchasers of the defendant's premium gasoline who saw the defendant's advertisements but never believed them would have valid claims under the Consumer Fraud Act. Likewise, purchasers who never saw the advertisements and thus were not deceived also would have valid claims. Such results plainly would have been at odds with *Zekman*. *Oliveira*, 201 Ill.2d at 155, 267 Ill.Dec. 14, 776 N.E.2d 151.

It has been recognized that a plaintiff bringing a class action suit need only allege a viable individual cause of action,

indicate that the claim is being brought as a class action, and include factual allegations broad enough to establish the possible existence of a class action. *Weiss v. Waterhouse Securities, Inc.*, 335 Ill.App.3d 875, 883, 269 Ill.Dec. 915, 781 N.E.2d 1105 (2002), *appeal allowed*, 203 Ill.2d 571, 273 Ill.Dec. 145, 788 N.E.2d 736 (2003); *see also Hayna v. Arby's, Inc.*, 99 Ill.App.3d 700, 711, 55 Ill.Dec. 1, 425 N.E.2d 1174 (1981). We agree with this statement. *Weiss* relied on *Arriola v. Time Insurance Co.*, 296 Ill.App.3d 303, 307, 230 Ill.Dec. 680, 694 N.E.2d 649 (1998), which stated that "[t]he class action statute [(735 ILCS 5/2-801 (West 1994))] makes no reference to any requirement that the facts establishing the class action prerequisites be pleaded." Class certification issues are typically factual and should be decided with the benefit of discovery. i, 335 Ill.App.3d at 884, 269 Ill.Dec. 915, 781 N.E.2d 1105.

After reviewing *Oliveira*, we do not believe that it changed the pleading requirements for class actions under the Consumer Fraud Act. Initially, we note that *Oliveira* did not address class certification. Because the named plaintiff's complaint was dismissed, the class certification issue was moot. *Oliveira*, 201 Ill.2d at 156-57, 267 Ill.Dec. 14, 776 N.E.2d 151. Thus, the decision did not expressly establish any requirements governing class actions under the Consumer Fraud Act. Moreover, *Oliveira* did not announce any new rule of law. It merely relied on *Zekman*, which in turn relied on established legal principles. *See Zekman*, 182 Ill.2d at 373, 231 Ill.Dec. 80, 695 N.E.2d 853. There is nothing in *Oliveira* that we read as imposing a pleading requirement that did not exist previously.

Because *Oliveira* did not purport to change the nature of Consumer Fraud Act claims, we do not believe that it did anything to affect the viability of class actions based on the Consumer Fraud Act. Indeed, because *Oliveira* did not directly involve class action principles, it is difficult to say that it

imposed any requirement that would make it more difficult for a class action based on the Consumer Fraud Act to proceed. A multi-state class action based on the Consumer Fraud Act is not a novelty in Illinois. *See Miner v. Gillette Co.*, 87 Ill.2d 7, 56 Ill.Dec. 886, 428 N.E.2d 478 (1981); *Gordon* 224 Ill.App.3d at 206, 166 Ill.Dec. 503, 586 N.E.2d 461. *Oliveira* merely held that the "market theory," which was premised on the assumption that neither the plaintiff nor anyone in the proposed class actually was deceived, could not establish the proximate causation element of a claim under the Consumer Fraud Act. This cause is not based on such an assumption. Instead, it involves a uniform billing practice that, from what we can tell at this stage of the litigation, has at least the potential to deceive customers. Moreover, we believe that our reasoning is consistent with the mandate that the Consumer Fraud Act be construed liberally to effectuate its purpose. *See Robinson*, 201 Ill.2d at 417, 266 Ill.Dec. 879, 775 N.E.2d 951. Therefore, our answer to the certified question is "no."

C. Class Certification

To certify a class action, the trial court must find that (1) the class is so numerous that joining all members is impracticable; (2) there are questions of fact or law common to the class, and the common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) the class action is an appropriate method for fairly and efficiently adjudicating the controversy. 735 ILCS 5/2-801 (West 2002). Whether to certify a class action is a matter within the sound discretion of the trial court, and we will reverse the trial court's decision only upon a showing that the court clearly abused its discretion or applied impermissible legal criteria. *Rubino v. Circuit City Stores, Inc.*, 324 Ill.App.3d 931, 942, 259 Ill.Dec. 156, 758 N.E.2d 1 (2001).

Defendant does not dispute that the class is so numerous that it would be impractical to join all members. Defendant argues, however, that the class cannot be certified because individual issues regarding actual deception predominate. We disagree. The trial court reasonably could have found here that there are common questions of law or fact that predominate over questions affecting only individual members. It is proper to allow a class action where a defendant is alleged to have acted wrongfully in the same basic manner towards an entire class. *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill.App.3d 538, 548, 278 Ill.Dec. 276, 798 N.E.2d 123 (2003). The purported class representative must establish that a successful adjudication of its individual claims will establish a right of recovery or resolve a central issue on behalf of the class members. *Avery v. State Farm Mutual Automobile Insurance Co.*, 321 Ill.App.3d 269, 280, 254 Ill.Dec. 194, 746 N.E.2d 1242 (2001), *appeal allowed*, 201 Ill.2d 560, 271 Ill.Dec. 922, 786 N.E.2d 180 (2002).

The primary factual issue in this case is a uniform billing practice that allegedly violated the Consumer Fraud Act in the same manner as to all class members. The propriety of such a uniform practice is amenable to being resolved in a class action. Once the trial court finds that a predominating question of fact or law exists, the presence of individual questions does not necessarily defeat class certification. *Kennedy v. Commercial Carriers, Inc.*, 294 Ill.App.3d 34, 39, 228 Ill.Dec. 421, 689 N.E.2d 293 (1997). Where it appears that the common issue is dominant and pervasive, something more than the assertion of minor hypothetical variations is required to prevent class certification. *Miner*, 87 Ill.2d at 19-20, 56 Ill.Dec. 886, 428 N.E.2d 478. Just as the class action in *Miner* was predicated on thousands of essentially identical transactions founded upon the language of the defendant's promotional offer (*Miner*, 87 Ill.2d at 19, 56 Ill.Dec. 886, 428 N.E.2d 478), the action here is founded upon an essentially identical entry appearing on the class members' bills. The trial court

reasonably could have found that individual class members' hypothetical reactions to the disputed charges were not sufficient to prevent the class action from going forward.

Also, that some class members reside outside Illinois or that the laws of different states may apply to the transactions at issue does not ordinarily prevent certification of the class. *Avery*, 321 Ill.App.3d at 281, 254 Ill.Dec. 194, 746 N.E.2d 1242. Because 50-state class actions are not uncommon in Illinois (*see, e.g., Clark*, 343 Ill.App.3d at 547-48, 278 Ill.Dec. 276, 798 N.E.2d 123), that the laws of 17 states are potentially implicated here is not necessarily problematic. The trial court may simply divide the class into subclasses. *Gordon*, 224 Ill.App.3d at 202, 166 Ill.Dec. 503, 586 N.E.2d 461. Defendant argues that the class action here would be unmanageable because it implicates the tax ordinances of over 1,000 local taxing bodies. The ordinances do not directly affect the substantive claims here, however. If the class members do not reside in municipalities authorizing a tax, then arguably no tax ordinance applies to them. It appears that the ordinances are relevant primarily to identify the class members. In any event, this is a hypothetical problem and is not a sufficient basis to deny certification of an otherwise proper class action. *Gordon*, 224 Ill.App.3d at 202, 166 Ill.Dec. 503, 586 N.E.2d 461. If, during a later stage of the litigation, the subclassification becomes unmanageable, the trial court always has the option to set aside the class certification or a portion of it. *Gordon*, 224 Ill.App.3d at 202, 166 Ill.Dec. 503, 586 N.E.2d 461.

The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim. *Avery*, 321 Ill.App.3d at 285, 254 Ill.Dec. 194, 746 N.E.2d 1242. The test to determine the adequacy of representation is whether the interests of those who are parties are the same as those who are not joined. *Miner*, 87 Ill.2d at 14, 56 Ill.Dec. 886, 428 N.E.2d 478. Also, the named plaintiff's

interest must not appear collusive. *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 338- 39, 13 Ill.Dec. 699, 371 N.E.2d 634 (1977). Here, it is apparent that plaintiff's interests are aligned with those of the class, and the record amply reveals plaintiff's desire to prosecute the claim vigorously on behalf of itself and the class members.

Defendant argues that plaintiff will be subject to unique defenses regarding proximate cause that impede its ability to represent the class. According to defendant, the deposition testimony reveals that the cellular bills did not actually deceive plaintiff and that plaintiff provided inaccurate information about its location in an unincorporated area. The assertion of individual defenses does not necessarily defeat a plaintiff's ability to represent the class adequately, however. *Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill.App.3d 1069, 1078, 125 Ill.Dec. 585, 530 N.E.2d 994 (1988). The trial court apparently found that a question of fact existed on these issues. Plaintiff paid the bills for some time before questioning them. Even after questioning the bills, plaintiff continued to believe that it owed the tax. The proximate causation issues that defendant raises against plaintiff are really not materially different from the issues affecting the entire class. Accordingly, it is not readily apparent that the presence of these potential defenses will interfere with plaintiff's ability to prosecute the claim on behalf of the class.

In deciding whether a class action is an appropriate method to adjudicate the controversy fairly and efficiently, a court considers whether a class action can best secure economies of time, effort, and expense or accomplish the other ends of equity and justice that class actions seek to obtain. *Clark*, 343 Ill.App.3d at 552, 278 Ill.Dec. 276, 798 N.E.2d 123. Our discussion about the first three elements of section 2-801 of the Code makes it evident that the trial court reasonably could have concluded that the fourth element was fulfilled. *Gordon*, 224 Ill.App.3d at 204, 166 Ill.Dec. 503, 586 N.E.2d 461. The

consumer class action is an inviting procedure to address alleged frauds that, like here, cause small damages to large groups. *Gordon*, 224 Ill.App.3d at 204, 166 Ill.Dec. 503, 586 N.E.2d 461.

Defendant argues that a class action is inappropriate here because the Illinois courts do not have the power to regulate the tax collection procedures in jurisdictions outside Illinois. As we stated earlier, however, plaintiff's claim is not about the tax ordinances of the local governments on whose behalf defendant collected the taxes. Instead, this claim is about defendant's billing practice of relying only on a customer's zip code to determine whether the customer owed a tax.

Finally, defendant contends that, because it will not be able to implead the out-of-state municipalities to which defendant remitted the taxes, the trial court should have at least limited the class to Illinois residents. At this point, there is no indication of how many out-of-state municipalities may have received tax revenue from nonresidents, as Barrington allegedly has. Moreover, defendant presumably would be able to seek redress in the states in which the affected municipalities are located. Accordingly, we cannot say that the trial court was wrong to reject this concern as a basis for denying class certification at this stage of the litigation After reviewing the elements of section 2-801 of the Code, we conclude that the trial court did not abuse its discretion in certifying the class action.

IV. CONCLUSION

We affirm the judgment of the circuit court of Lake County certifying the class action, answer the certified question in the negative, and remand the cause.

Affirmed; certified question answered; cause remanded.

BOWMAN and GILLERAN JOHNSON, JJ., concur.

APPENDIX C

Supreme Court of Illinois.

P.J.'S CONCRETE PUMPING SERVICE, INC., etc.,
respondent,
v.
NEXTEL WEST CORP., petitioner.

No. 95603.

April 2, 2003.

Petition for leave to appeal denied.

In the exercise of this Court's supervisory authority, the Appellate Court, Second District, is directed to vacate its judgment in *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, case No. 2-02-1219 (12/18/02), denying application for leave to appeal, and to consider the certified question for appeal.

203 Ill.2d 550, 785 N.E.2d 861, 271 Ill.Dec. 667

APPENDIX D

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

P. J.'s CONCRETE PUMPING SERVICE, INC., individually and as the representative of a class of similarly-situated persons,

Plaintiff,

v.

NEXTEL WEST CORP.,

Defendant.

MAY 15 2002

CLERK

No. 01 MR 860

CLASS CERTIFICATION ORDER

This cause coming to be heard on plaintiff's Motion for Class Certification, the Court having reviewed the pleadings, having heard oral argument from the parties, and having been otherwise fully advised in the premises, the Court finds and it is hereby ordered that:

1. The Court certifies the following class (the "Class"):

   All persons in Illinois, Arizona, Colorado, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin who, on or after August 30, 1996, paid Defendant local, municipal, or substantially-similar taxes at a time when their billing address was not within a municipality that authorized or directed Defendant to collect the tax.

   The judges and staff of the Illinois judiciary are excluded from the Class.

2. Pursuant to 735 ILCS 5/2-801, the Court finds:

   (a) The Class is so numerous that joinder of all members is impracticable;

   (b) There are questions of fact or law common to the Class that predominate over any questions affecting only individual members;

   (c) Plaintiff will fairly and adequately protect the interests of the Class; and

   (d) A class action is an appropriate method for the fair and efficient adjudication of this controversy.

3. The Court appoints plaintiff as the class representative.

4. The Court appoints plaintiff's counsel, Macey Chern & Diab and Anderson + Wanca, as counsel for the Class.

Entered: JOHN R. GOSHGARIAN

Dated: _____